EDMUND G. BROWN JR., State Bar No. 37100
Attorney General of California
JONATHAN RENNER, State Bar No. 187138
Senior Assistant Attorney General
PETER A. KRAUSE, State Bar No. 185098
Deputy Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5328
Fax: (916) 324-8835
E-mail: Peter.Krause@doj.ca.gov
Attorneys for Defendant Steven Lindley, in his official capacity as Acting Chief of the California Department Of Justice

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

STATE AMMUNITION INC., dba www.stateammo.com; JIM OTTEN, dba www.a1ammo.com, and JIM RUSSELL USMC (Ret.),

Plaintiffs,

v.

STEVEN LINDLEY, in his official capacity as Acting Chief of the California Department of Justice, Bureau of Firearms, and DOES 1 through 10,

Defendants.

Case No. 10-CV-01864 -MCE-KJN

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT STEPHEN LINDLEY'S MOTION TO DISMISS, OR, IN THE ALTERNATIVE, TO STAY THE ACTION

Date: November 18, 2010
Time: 2:00 p.m.
Ctrm: No. 7 - 14th Floor

Judge: Hon. Morrison C. England, Jr.
Trial Date: None
Action Filed: July 16, 2010

INTRODUCTION

This action is unripe and invites the Court to issue a broad advisory opinion concerning whether California's AB 962 will, when it goes into effect in February 2011, (1) violate the Commerce Clause, (2) deprive Plaintiffs of Due Process and Equal Protection, and (3) unreasonably infringe their right to keep and bear arms in violation of the Second Amendment. Given that AB962 is largely dormant, the allegations plead in the complaint are based primarily on speculation, and there has been no threat of enforcement against Plaintiffs, the issues presented are not ripe for adjudication.

Plaintiffs' claims are also foreclosed by the Eleventh Amendment, which immunizes states from suit in federal court absent a valid abrogation of that immunity by Congress. Although state officers may be sued in federal court under limited circumstances, this action against Stephen Lindley is barred because he lacks a connection to the enforcement of the challenged statute. Plaintiffs also cite no threat of enforcement apart from a general information bulletin that Lindley's predecessor published in December 2009, which is clearly insufficient to bring this action within the *Ex Parte Young* exception to Eleventh Amendment immunity. And should Plaintiffs' claims survive dismissal, Mr. Lindley respectfully requests that the Court exercise its discretion to stay this action to allow the Superior Court in *Parker v. State of California* to construe AB 962.

For the foregoing reasons, and as more fully explained below, the State respectfully requests that the Court grant this motion.

ARGUMENT

I. PLAINTIFFS HAVE NOT ALLEGED A RIPE CONTROVERSY.

This motion presents a threshold question of ripeness. The ripeness doctrine precludes federal courts from exercising their declaratory judgment jurisdiction over an action before a concrete dispute exists between the parties. *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240 (1937); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125-126 (2007). The Supreme Court instructs that ripeness is "peculiarly a question of timing," *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 140

(1974), designed to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967). A court's role is neither to issue advisory opinions nor to declare rights in hypothetical cases, but to adjudicate live "cases or controversies" consistent with the powers granted the judiciary in Article III of the Constitution. *See* U.S. Const. art. III.

In their Opposition, Plaintiffs assert that "Defendant's argument of failure to allege a ripe controversy is completely without merit where portions of the law are already effective." (Opp., p. 4:1-2.) This argument, for which Plaintiffs cite no authority, is circular and ignores the pivotal question of whether a live case or controversy exists, or instead whether the purported conflict remains too abstract. The question in a ripeness analysis is not only whether the challenged statutes are effective, but also whether the plaintiff can allege existing injury, know how the law will actually be enforced, or what its effects might be on plaintiffs and others.

Until AB962 takes full effect, and Plaintiffs can specifically identify some concrete injury or a genuine threat of enforcement,[1] no one can know precisely how the statute might apply to, or be enforced against, these plaintiffs, if at all. Indeed, it is unclear whether Plaintiffs will even engage in conduct proscribed by the statute. Plaintiffs' claimed injuries are premised on dubious conclusions and predictive facts, hence the issues framed in the complaint are not ripe for adjudication. A mere difference of opinion does not give rise to a ripe controversy.

Finally, Plaintiffs' apparent argument that the mere existence of AB962 creates a ripe controversy is contradicted by the authorities cited in the State's motion, none of which are addressed in the Opposition. For example, in a pre-enforcement challenge with facts closely analogous to the ones here, the Ninth Circuit held that neither the mere existence of a proscriptive statute, nor a generalized threat of prosecution, satisfies the

[1] Plaintiffs argue that the Department of Justice has threatened to enforce AB962 via publication in 2009 of an information bulletin that discussed, very generally, four firearms laws that took effect in 2010. The bulletin is addressed in detail in Section II, but they contain no "threats of imminent prosecution" against Plaintiffs or anyone else.

"case or controversy" requirement in a ripeness inquiry. *San Diego County Gun Rights Comm'n v. Reno*, 98 F.3d 1121, 1126-27 (9th Cir.1996) ("'[t]he mere existence of a statute . . . is not sufficient to create a case or controversy within the meaning of Article III.' [Rather, there must be a] genuine threat of imminent prosecution."). Similarly, the mere existence of AB962 is insufficient to create a ripe controversy.

II. STEPHEN LINDLEY, IN HIS OFFICIAL CAPACITY AS AN ACTING BUREAU CHIEF FOR THE CALIFORNIA DEPARTMENT OF JUSTICE, IS IMMUNE FROM SUIT IN FEDERAL COURT UNDER THE ELEVENTH AMENDMENT.

"Under the Eleventh Amendment, a state is immune from suit under state or federal law by private parties in federal court absent a valid abrogation of that immunity or an express waiver by the state." *Mitchell v. Franchise Tax Bd.*, 209 F.3d 1111, 1115-16 (9th Cir. 2000).

An exception to Eleventh Amendment immunity first announced in *Ex Parte Young*, 209 U.S. 123 (1908) allows "suits for prospective declaratory and injunctive relief against state officers, sued in their official capacities, to enjoin an alleged ongoing violation of federal law." *Wilbur v. Locke*, 423 F.3d 1101, 1111 (9th Cir. 2005). But, for the *Ex Parte Young* exception to apply, the state officer must have some direct connection with the enforcement of the act. *Snoeck v. Brussa*, 153 F.3d 984, 986 (9th Cir. 1998). Further, "there must be a threat of enforcement. . . . Absent a real likelihood that the state official will employ his supervisory powers against plaintiffs' interests, the Eleventh Amendment bars federal court jurisdiction." *Long v. Van de Kamp,* 961 F.2d 151, 152 (9th Cir. 1992); *Snoeck,* 153 F.3d at 987 ("the officers of the state must . . . threaten or be about to commence civil or criminal proceedings to enforce an unconstitutional act").

The Complaint contains no allegations establishing Mr. Lindley's "direct connection" to the administration or enforcement of AB962 and cites no threat of enforcement. Instead, Plaintiffs argue that Mr. Lindley has a sufficient nexus to the act because of an information bulletin that his predecessor published in December 2009. (Opp., p. 5:18-19 & Exh. "1" to Request for Judicial Notice.) The bulletin, which merely

summarizes four new California firearms laws, does not threaten enforcement against anyone, let alone Plaintiffs. This case plainly fall outside the *Ex Parte Young* exception.

Plaintiffs cite several cases in support of their position, all of which are distinguishable because they involved either a direct enforcement connection, actual threats of enforcement, or both. These authorities support Mr. Lindley's position that only a direct threat of enforcement is sufficient to abrogate immunity. For instance, in *Culinary Workers Union, Local 226 v. Del Papa*, 200 F.3d 1240 (9th Cir. 1999), the Nevada Attorney General sent a letter to the plaintiff notifying it that a handbill that it had distributed violated a Nevada statute against making derogatory statements about banks. *Id.* at 616. The letter threatened to prosecute plaintiff for refusing to comply. *Id.* The Attorney General also admitted that he had threatened to apply the statute against the union. *Id.* The court held that "such an express threat instills a fear of criminal prosecution that cannot be said to be 'imaginary or wholly speculative.'" *Id.* at 618.[2]

Because this action against Mr. Lindley is based solely upon his generalized duty to enforce state law, and there is no legitimate threat or fear of enforcement, it is tantamount to a prohibited action against the State itself and the Court should dismiss the complaint under the Eleventh Amendment.

III. IF THE COURT DOES NOT DISMISS THE COMPLAINT IN ITS ENTIRETY, IT SHOULD STAY THE ACTION PENDING RESOLUTION OF *PARKER V. STATE OF CALIFORNIA, ET AL.*

The State urges the Court to stay this action if it is not dismissed on one of the grounds discussed above. As noted, *Parker v. State of California, et al.* involves a challenge to AB 962's definition of "handgun ammunition" as vague – an issue that is also raised in this case. (*See* Complaint ¶¶ 11, 13, 18, 23, & 33.) A stay is appropriate to

[2] Plaintiffs' other cases are similarly distinguishable. *See Morales v. TWA*, 504 U.S. 374, 382 (1992) (vacating "blunderbuss injunction" in a preemption case to the extent that it restrained the operation of laws the state had not threatened to enforce); *Socialist Worker Party v. Leahy*, 145 F.3d 1240, 1246 (11th Cir. 1998) (non-11th Amendment case; enforcement threat where secretary of state "threatened plaintiff-appellants with application of the [statute] on multiple occasions stretching over some four years"); *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1111 (E.D. Cal.2002) (finding enforcement connection where Attorney General and gambling director "repeatedly warned plaintiffs not to violate the relevant Penal Code provisions.").

allow the Superior Court to adjudicate these claims of vagueness. And of course, if the vagueness challenge in *Parker* is successful, AB 962 could be found unconstitutional and this action will become moot. At a minimum, the Superior Court's ruling in *Parker* will provide crucial direction to this Court in its analysis of the issues presented in this case, as a state court will have construed the state law at issue. For all these reasons, the Court should exercise its discretion to stay this action under *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962).

Plaintiffs argue that they will be prejudiced by a stay because they intend to seek a preliminary injunction, which would be impossible if the case is stayed. (Opp., p. 6:17-20.) Even if Plaintiffs can establish that a preliminary injunction was necessary (a questionable proposition), a short delay is not so heavy a burden when weighed against all the factors that counsel in favor of a stay, including (1) the unripe nature of this case, (2) the lack of injury to Plaintiffs, (3) the absence of enforcement threats, (4) the promotion of judicial economy, and (5) avoiding the needless construction of a state statute before it has been construed by a state court.

Furthermore, the *Parker* case is at issue, a preliminary injunction motion will be decided by the time this motion is heard, and the parties in *Parker* have discussed filing cross-motions for summary judgment that could allow a decision to issue before the majority of AB962 takes effect on February 1, 2011. If circumstances change in the meantime, or Plaintiffs are suddenly threatened with enforcement, they can seek to lift the stay. Until then, however, the State respectfully requests that the Court stay these proceedings pending a decision in *Parker v. State of California.*

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CONCLUSION

For all the foregoing reasons, the State respectfully requests that the Court issue an order dismissing the complaint and, if necessary, staying the action pending a decision in the matter of *Parker v. State of California, et al.*

Dated: November 10, 2010

Respectfully Submitted,

EDMUND G. BROWN JR.
Attorney General of California
JONATHAN K. RENNER
Senior Assistant Attorney General

/s/ Peter A. Krause

PETER A. KRAUSE
Deputy Attorney General
Attorneys for Defendant Steven Lindley, in his official capacity as Acting Chief of the California Department Of Justice

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